
DATE: September 29, 1995

CASE NO: 95-ERA-20

In the Matter of

ROBERT O. KLOCK,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,

and

UNITED ENERGY SERVICES CORPORATION,
Respondents

Appearances:

Peter Alliman, Esq.
Robert Stacy, Esq.
Micaela Burnham, Esq.
For the Complainant

Brent R. Marquand, Esq.
Thomas F. Fine, Esq.
For the Respondent
Tennessee Valley Authority

Lawrence S. Kalban, Esq.
Carl Sottosanti, Esq.
For the Respondent
United Energy Services Corporation

Before: THOMAS M. BURKE, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. Section 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1974, as amended, 42 U.S.C.A Section 2011, *et seq.* The Secretary of Labor is empowered to investigate "whistleblower" complaints

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filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

Complainant, Robert 0. Klock, contends that he was discharged from employment by respondents, Tennessee Valley Authority ("TVA") and United Energy Services Corporation ("UESC"), because he engaged in protected activity, that is, because he contacted the NRC regarding certain conditions and acts by respondent TVA which he believed were unsafe or violated NRC regulations.

The District Director of the Nashville, Tennessee, regional office of the Employment Standards Administration, United States Department of Labor, found after an investigation that complainant was a protected employee engaging in a protected activity and that discrimination was a factor in the termination of his employment. Respondent TVA was ordered to restore complainant to his prior or comparable employment and to repay wages lost because of the job termination. TVA was also required to pay to complainant the costs he incurred as a result of his loss of income, and was ordered to cease all discrimination with respect to complainant's compensation or conditions of employment because of any action protected by the ERA.

Respondents timely appealed the Employment Standard Administration's order to the Office of Administrative Law Judges. A hearing was scheduled for March 14 and 15, in Knoxville, Tennessee. The hearing was continued at the request of complainant to allow him time to retain counsel.[1] The hearing was rescheduled for April 4 and 5, 1995. The parties were allowed thirty days after the receipt of the hearing transcript to submit a post-hearing brief. The parties did not receive a copy of the transcript until May 24, 1995. A joint motion by Complainant and respondent TVA for an order extending the period of time for submission of post-hearing briefs was granted. Posthearing briefs of complainant and respondent TVA were received on July 10, 1995. Respondent TVA submitted a reply brief on August 1, 1995.

FINDINGS OF FACT

Complainant, Robert 0. Klock, was employed at TVA's Watts Bar nuclear power plant in Tennessee from September 14, 1992 until his involuntary termination on July 5, 1994. He was employed by UESC pursuant to an agreement between UESC and TVA whereby UESC provided services of startup engineers to develop and execute a comprehensive nuclear startup program at Watts Bar.[2]

At the time complainant was hired at Watts Bar, and during

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his employment there, the plant was in the process of preparation for commercial operation. To prepare for commercial operation, TVA is required to test the plant systems to verify that the systems' components meet safety design requirements. Complainant's contract with UESC provided that he would work as a Lead Engineer in the Startup and Test organization ("Startup").

Startup is a temporary organization responsible for the preoperational tests; it will last only as long as is required to bring the Watts Bar plant onto commercial operation. Because it is temporary, Startup is staffed mostly by employees of several different employment augmentation contractors including UESC. TVA uses contract employees to do temporary work, rather than hiring permanent employees, because the permanent employees will become superfluous upon completion of the temporary work. Complainant was such a contract employee.

Complainant has worked in the nuclear industry for approximately 18 years, principally supporting startup tests in nuclear power plants. His first nuclear industry employment was in construction and startup at the Calvert Cliffs plant in Maryland. He next worked at North Anna in Virginia for four years as a general foreman responsible for startup tests. He worked at Palo Verde in Arizona, where he conducted startup activities. His job at Palo Verde continued after the initial startup phase; he conducted startup testing for three years after the plant became operational. He worked at Palo Verde for approximately eight years. After Palo Verde, he worked at other nuclear plants such as Trojan nuclear plant in Oregon, the River Bend power station in Louisiana and the Peach Bottom Plant in Pennsylvania, where he was the ILRT Coordinator and test director. Complainant next returned to Calvert Cliffs for a period of approximately a year and a half before accepting the position with UESC at Watts Bar. Richard Daly, Jr., the startup manager at Watts Bar until May, 1994, testified that he had known complainant since they worked together at the North Anna nuclear plant in the aid-1970s. He characterized the quality of the complainant's work as excellent, and described complainant as very dedicated, a hard pusher and very knowledgeable.[3] Kenneth E. Miller, a consultant with the NRC, knows complainant from complainant's work at Palo Verde and Watts Bar. Miller described complainant as one of the best persons working on startup procedures at nuclear plants.[4]

Complainant worked as a startup engineer in Startup's Nuclear Steam Supply System ("NSSS") Group. His initial assignments included the flushing and testing of component systems. He described the flushing program as pushing and moving water through all the lines to verify cleanliness of the safety and non-safety related systems. In early 1994 complainant was

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assigned work with the local leak rate test ("LLRT"). The LLRT is a test to verify that the containment isolation valves are leak tight. Containment isolation valves prevent the escape of contaminants in the event of an accident. At the request of Daly, complainant also accepted responsibility as system engineer for assuring the operation of the ice condenser system.[5] The ice condenser system had been shut down and totally dismantled approximately three years earlier.

Complainant subsequently worked on the integrated leak rate test ("ILRT"). The flushing program and LLRT were programs leading up to the ILRT, a "major milestone" with high visibility[6] that has to be completed before the plant can become operational. The ILRT involves pressure testing the whole system. The ILRT was performed during the period June 22 through

29, 1994. Complainant was described as the key player in the setting up of the leak rate tests by Daly and Keith Pierce, the site manager for UESC personnel at Watts Bar. Daly described complainant as being very knowledgeable in these valve testing procedures. "He pushed every one of these procedures through the necessary hoops to get them approved...he was the key man in that damn thing." Daly often communicated directly with complainant because he "didn't want to get anything scrambled.[7] Pierce offered the opinion that complainant was more than anyone else responsible for the success of the LLRT and ILRT programs. He characterized complainant's work thereon as outstanding.[8]

Although complainant was employed by UESC, he was supervised by TVA personnel. His immediate supervisor was Bill Bryant, the test group lead for NSSS. Bryant reported to Daly, and after Daly left Watts Bar in May of 1994, to Daly's replacement, Masoud Bajestani. However, complainant only saw Bryant when dealing with his work schedule or seeking approval of overtime. In actuality, complainant looked to the group leader of the system he was working on for direction on any problem that might arise. Ken Clark was the group leader for the LLRT and ILRT programs. The group leader reported to Dennis Koehl, Technical Support Manager, who in turn reported to Bajestani.[9] Bajestani reported to Site Vice-President John Scalice. Complainant's contact with UESC was through Keith Prince, UESC's site manager.

Complainant reported several safety concerns to TVA management and the NRC site inspector during the month of June, 1994. Complainant testified that problems arose in the LLRT, ILRT and ice condenser system programs that he was responsible to resolve, and if TVA people reacted inadequately, he would, at times, call the problems to the attention of Miller, the NRC inspector assigned to the LLRT and the ILRT. Complainant testified to specific examples. His first reported contact with the NRC occurred while he was systems engineer for the air lock

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tests. Complainant recommended that a containment air lock test not be attempted because some design changes thought to be necessary by complainant had not been completed. The test failed as the leak rate was about four times the acceptable criteria. In response to questions from Miller, complainant expressed concern that the test had been attempted without the design changes being made. Miller reacted by meeting with Bajestani and Koehl to advise that TVA personnel should work closer with complainant in the testing.[10]

The flushing program detected problems caused by organisms growing in the water pipe lines. Complainant informed his TVA supervisors that the organisms were able to grow because of engineering deficiencies such as insufficient velocity of the water used to flush the system that he believed allowed the organisms to grow. TVA rejected complainant's advise for correcting the problem and, instead, instructed complainant to "accept as is." Complainant subsequently discussed the problem of organisms in lines with Miller, the NRC inspector.[11]

During the heat exchanger thermal performance test program, Miller sought out complainant's opinion on the type of instrumentation that should be used, as Miller was aware that complainant had experience with the test at other plants.

About one week prior to commencement of the ILRT, complainant raised a concern about vents being open to atmospheric contaminants during a valve alignment program performed in preparation for the ILRT. Complainant thought contamination through the open valves was a realistic concern because of ongoing construction at the plant, including cutting and grinding. Complainant voiced his concern at a daily work group meeting while Miller was present. Miller then discussed complainant's concern with Koehl and Jose Ortiz, the LLRT and ILRT engineer who worked for Koehl. Complainant detected a concern by TVA over why the NRC was addressing and raising all these issues. Complainant was told by Ortiz and Clark that these concerns that he had discussed with the NRC inspector were "non-issues."[12]

The ILRT was scheduled to commence on June 22 or 23, 1994. The test necessitated the proper alignment of approximately 700 valves. Early in the day on June 22, complainant identified a closed valve that should have been open for the purposes of the test. Complainant informed Clark of the closed valve at about 3:00 p.m. Clark responded that the valve was in the correct position; that it wasn't a problem. Complainant raised the problem again with Clark later that evening at about 7:00 p.m., but got no response. At the end of his shift, about 8:30 p.m., complainant informed Rocky Gilbert, the NRC inspector assigned to the ILRT, of the closed valve. Gilbert replied that he would

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take care of it.[13] Miller testified that the reason complainant contacted Gilbert was that complainant felt after talking to Clark that Clark was not going to fix the problem and he wanted to assure that the problem would be fixed.[14] When the complainant returned to work at about 7:00 a.m. the following morning, Miller was at complainant's desk, waiting for him. Miller requested information on the closed valve, such as a copy of the LLRT performed on the valve and available drawings and flow diagrams. After discussion with complainant and a review of the documents, Miller concurred that the valve should not be closed. Then, complainant proceeded to Koehl's office with the drawings to discuss the valve placement. However, Bajestani had earlier been made aware of complainant's concern with the valve placement and, prior to seeing complainant, had sent Lonnie Farmer and one other TVA employee to look at the valve. They reported that the valve alignment was correct and complainant was wrong. Nevertheless, after a discussion between complainant, Bajestani and Koehl, it was agreed that there was a problem. The three of them decided to go and personally inspect the valve. On the trip to the valve location they were joined by three NRC inspectors, including Caudle Julian, chief inspector from NRC's Atlanta office, who were proceeding to inspect the valve themselves. The inspection revealed that the complainant was correct; the valve alignment had to be changed. The inspectors who had been sent to look at the valve alignment earlier that day had inspected the wrong valve. A procedure change was written and the valve alignment was changed that evening. The ILRT test was delayed approximately 24 hours.[15]

Complainant testified that Koehl was angry because a problem existed causing a delay in the ILRT and because TVA did not

initially identify the misalignment but had to be informed of it by the NRC. Koehl testified that "[i]t was a very embarrassing morning. I had to inform (the NRC) on three different occasions of different problems we had..."[16] Miller testified that Bajestani and the other TVA employees were embarrassed by complainant bringing the misaligned valve to the attention of the NRC.[17]

The ILRT was completed on Wednesday, June 29, 1994. Complainant had previously discussed with Bryant, the NSSS lead, the possibility of taking time off after completion of the ILRT. Complainant had worked significant overtime on the ILRT; he had already worked 63 hours by Wednesday of that week. He approached Bryant on June 29th and received permission to take the rest of the week off, through Monday, July 4. Complainant testified that he also requested from Bryant permission to take off July 5 through 9, Tuesday through Friday, in the event he obtained custody of his children. According to complainant's testimony,

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his intention was to leave on June 29, 1994 for Maryland where his divorced wife and children resided. If he was able to obtain custody of the children, he would take them to Disney World in Florida. If he made the trip to Florida, he would not return to the plant until Monday, July 11. Complainant testified that Bryant granted his request to take off the four days, July 5 through 9. Complainant also told Prince before he left on his vacation that he might need some "extra" time off because he felt burnt out. Prince replied that complainant taking the time off was alright with him.[18]

Complainant telephoned Prince, the USEC site manager, on July 5 from Florida to inform Prince that he had gone to Florida and would return to the plant on July 11, and to ask Prince to relay the information to Bryant. Prince responded: "Have a good vacation because you've worked all these hours."[19] Prince immediately telephoned Bryant and relayed complainant's message. Prince testified that Bryant expressed no surprise or concern; he merely acknowledged the call, replied "okay" and "thanks for calling." However, about one and a half to two hours later, Prince received a telephone call from Bill Huffaker, the contract administrator with the startup group, informing that complainant was let go "because he took vacation without getting it cleared up front."[20]

When complainant returned from his vacation on the evening of July 10, he found a note placed on his door by a co-worker neighbor stating that he had been fired.

Complainant telephoned Prince about 11:00 on the night of July 10. Prince suggested that they meet at the plant in the morning and together attempt to straighten matters out. Complainant went to Prince's office the next morning. While complainant was in his office, Prince telephoned Bajestani twice and left messages, and telephoned Bryant once. Neither returned his call. Complainant and Prince proceeded to Bryant's office. Bryant informed them that when he told Bajestani on Wednesday that complainant would not be at work until July 11, Bajestani responded that if Bryant could get by without complainant, he would let complainant go. Complainant asked if he could talk to Bajestani. Bryant replied that he did not think Bajestani would

talk to him. Prince approached Bajestani on complainants behalf; he asked Bajestani to please take a few minutes to talk to complainant. Bajestani became irate and loud; he began hollering that he wanted complainant off the site immediately. Prince characterized Bajestani's demeanor as going "ballistic." Bajestani described his temperament as "excited." Prince returned and accompanied complainant to his desk. Bryant appeared at complainant's desk and said that Bajestani had sent him over to observe complainant cleaning out his desk.[21] After

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complainant cleaned out his desk, Prince escorted him to the gate and took his badge. On the way to the gate complainant expressed the desire to talk to Employee Concerns, an organization established by TVA to address employee safety concerns. Prince responded: "That's fine, but you're going to do it from the outside, make an appointment because if we don't get you off site, security is going to come and make things ugly for us."[22] Complainant left.

Complainant testified that as he was leaving, Bryant offered to meet him later, off site. Bryant denies suggesting the meeting. But, in any event, complainant and Bryant did meet at a bar/restaurant outside the plant either later that evening or the following evening. Complainant testified that Bryant told him that he did not know why complainant was fired; that it was Bajestani's decision. Bryant testified that he doesn't remember any details of the conversation, but he denies that he would have said he didn't know the reason since, at that time, he knew the reason for complainant's termination, that is, unexcused absence.

Complainant contacted Employee Concerns by telephone the afternoon of his firing. He received a return call the following day from Keith Ackley, a TVA employee, who told complainant that he was not fired. Complainant inquired of Ackley where he got his information. Ackley called back two days later but was informed by complainant that he had retained counsel and all contacts would have to be through counsel.

Complainant testified that the first time he was given a reason for his termination was when he applied for unemployment compensation on July 14, 1994. He was told by the Tennessee Unemployment Commission that the reason provided by TVA for terminating his employment was absenteeism.

Prior to his termination complainant had worked for twenty-two months at Watts Bar. During the twenty-two months he missed only twelve work days. He was off five days for an operation and seven days for trips to Maryland mandated by divorce proceedings.

Since his termination complainant has been unable to obtain a job in the nuclear industry even though he has filed at a minimum twenty job applications. He thought that two job openings were particularly promising: at the Crystal River Nuclear Plant doing startup testing and at the Milestone Nuclear Plant in Connecticut for Cataract, an employment contractor. However, both applications were rejected after the prospective employers were made aware of complainant's employment and termination at Watts Bar. Complainant accepted employment at the end of October 1994 as a steamfitter with Steam Fitters Local 602 for M.W. Slosher installing and starting up HVAC (heating,

ventilation and air-conditioning) equipment. He was laid-off by Slosser, but he found a position doing refrigeration work with a

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company from Buffalo, New York. Both of these positions paid $21.49 an hour. His salary was $39.83 an hour plus $3.00 an hour in benefits at Watts Bar.

MOTION FOR SUMMARY JUDGMENT

Respondent, United Energy Services corporation, moved at the commencement of the hearing for summary judgment in its behalf pursuant to Rule 56 of the Federal Rules of Civil Procedure. UESC argues in its motion that there is no genuine issue of material fact that UESC did not take any adverse action in violation of the Act against the complainant.

The complainant concedes that UESC did not participate in the decision to terminate the complainant from his position with TVA on July 5, 1994, and that UESC did not discriminate against complainant in violation of the ERA.[23] TVA does not dispute complainant's concession.[24]

Respondent's motion was denied at the commencement of the hearing for reason that UESC may be a necessary party to the formulating of a remedy in the event that complainant is successful in this claim since complainant was an employee of UESC while working at TVA's Watts Bar plant. UESC again moved for summary judgment post hearing. After reconsideration, UESC's motion is granted. Jurisdiction vests in the Secretary under the ERA to issue orders of abatement of violations of the ERA only to employers who have violated the ERA. 29 C.F.R. 524.6(b)(2). As UESC has not violated the ERA, the Secretary lacks jurisdiction under the ERA to order UESC to undertake any action toward the complainant. Moreover, a remedy can be formulated without jurisdiction over UESC. TVA can be ordered to reinstate complainant either as a contract employee of UESC or as its own employee.

Accordingly, respondent UESC's motion for summary judgment is granted. The complaint against UESC in dismissed.

PRIMA FACIE CASE

The requirements for establishing a prima facie case under Section 210 of the ERA were set out by the Secretary of Labor in *Darty v. Zack Co. of Chicago*, Case No. 82-ERA-2 (Sec'y, April 25, 1983) *slip op*. at 8. They are: (1) the complainant engaged in protected activity; (2) the complainant was subject to adverse action; and (3) that the respondent was aware of the protected activity when it took the adverse action against him. The complainant must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

PROTECTED ACTIVITY

Section 210 provides that:

> No employer may discharge any employee or otherwise

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> discriminate against any employee with respect to his compensation, terms, conditions, or privileges of

> employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C.A. §2011 *et seq.*);
>
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 (42 U.S.C.A. §2011 *et seq.*), if the employee has identified the alleged illegality to the employer;
>
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 (42 U.S.C.A. §2011 *et seq.*);
>
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C.A. §2011 *et seq.*), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended. 42 U.S.C.A. §5851.

Complainant has established that he engaged in protected activity on at least five occasions.

The first protected activity was complainant's disclosure to Miller, the NRC inspector, that TVA personnel had performed a containment air lock test against complainant's recommendation that it not be performed because design changes necessary for a successful test were not completed. Miller reacted to complainant's information by meeting with Bajestani and Koehl to suggest that cooperation between complainant and other TVA people be increased. Miller considered this incident as an example of

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poor cooperation. He testified:

> A. For an example, the air lock test. [Complainant) told Jose Ortiz and Ken Clark that the air lock is not ready to test and [complainant] didn't want to go ahead and test it because he expected it was going to fail. So Jose and Ken Clark decided they were going to go out there and test that air lock and see what happened. It failed.
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> Q. Okay.
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> A. If they had just waited until the necessary repair work had been completed on the air lock, they probably would have just done the test once. That's the kind of thing I'm talking about.[25]

The second protected activity was complainant's informing Miller that TVA personnel had rejected complainant's advice for correcting a problem of organisms growing in the water pipe lines. Complainant believed that the velocity of the water used to flush the system was insufficient.

Complainant's discussion with Miller regarding the type of instrumentation that should be used in the heat exchanger thermal performance test program was a third occasion where he engaged in protected activity.

The fourth occasion when complainant was engaged in protected activity occurred about one week prior to commencement of the ILRT program when complainant voiced a concern about vents being open to atmospheric contaminants during a valve alignment program. Complainant expounded on his concern during a daily work group meeting while Miller was present. Miller's recollection is that he subsequently discussed the contamination problem with Ken Clark and Jose Ortiz.

Complainant's fifth engagement in protected activity occurred on June 22, 1995, one or two days before the ILRT program was scheduled to begin. Complainant informed Rocky Gilbert, the NRC inspector assigned to the ILRT, of a closed valve that should have been opened for the ILRT to be successful. Complainant imparted the information to Gilbert because he had earlier tried and failed to convince Clark, the ILRT group leader that the valve was misaligned. Complainant's meeting the next morning with Miller, wherein he persuaded Miller that the valve was misaligned, his subsequent meeting with Koehl and Bajestani to explain the problem, and his guiding of the group of Koehl, Bajestani, and three NRC inspectors to inspect the valve, all constitute protected activity.

ADVERSE ACTION

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Complainant was fired from his job by Bajestani on July 5, 1995, less than two weeks after he had engaged in protected activity.

KNOWLEDGE OF PROTECTED ACTIVITY

Complainant must show that TVA had knowledge of his protected activity at the time of the adverse employment action. *Hassell v. Industrial Contractors, Inc,* Case No. 86-CAA-7 (Sec'y, Feb. 13, 1989).

On direct examination Bajestani testified that he did not know that the complaint had raised any concerns with the NRC when he made the decision on July 5, 1995 to fire complainant.[26] However, complainant testified that he told Bajestani, Koehl and Clark that he had reported the misaligned valve to the NRC. It is undisputed that complainant led the impromptu inspection of the valve and that the inspection group included Bajestani, Koehl and three NRC inspectors.

Moreover, Bajestani admitted on cross-examination that he knew on June 23 or 24, the day the ILRT test was completed and ten or twelve days before he fired complainant that complainant had informed the NRC about the misaligned valve.[27] Thus, complainant has shown that TVA knew about his protected activity at the time he was fired.

REASON FOR TERMINATION

Complainant has shown that he engaged in protected activity, that he suffered an adverse action when he was subsequently fired, and that TVA knew of the protected activity when it terminated his employment. Complainant must, to establish a *prima facie* case, present evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Dean Dartey v. Zach Company of Chicago,* Case No. 82-ERA2, *slip op.*, (Sec'y, April 25, 1983). *Stack v. Preston Trucking Co.,* Case No. 86-STA-22, *slip op.*, (Sec'y, Feb. 26, 1987) and *Haubold v. Grand Island Express, Inc.*, No. 90-STA-10, *slip op.*, (Sec'y, April 27, 1990).

Complainant was fired by Bajestani on July 5, 1994, less than two weeks after complainant had contacted Gilbert, the NRC inspector assigned to the ILRT, about the misaligned valve because complainant became concerned when Clark, the group leader for the ILRT, disagreed that the valve was out of alignment, and less than two weeks after the complainant led the impromptu tour, including Bajestani, Koehl and three NRC inspectors, to inspect the valve, an incident which according to Koehl prompted "a very embarrassing morning."[28] The firing was also less than four weeks after Miller, the NRC inspector assigned to the LLRT and ILRT, met with Bajestani and Koehl, to advise that TVA personnel, particularly Clark and Ortiz, needed to work closer with complainant in light of the failed leak rate test.

This temporal proximity of the firing of complainant to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse action. The Court of Appeals in *Couty v. Dole*, 886 F.2d 147 (5th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in *Goldstein v. Ebasco Contractors Inc.*, Case No. 86-ERA-36 (Sec'y, April 7, 1992).

Moreover, complainant's value as an experienced and conscientious employee raises an inference that the firing was caused by retaliatory motivation because it is evidence that his firing was motivated by reasons other than sound business practice. As previously discussed, Daly, the startup manager, characterized the quality of complainant's work as excellent and described complainant as very dedicated, a hard pusher and very knowledgeable. Daly extolled complainant's competence in the valve testing procedures as "the key man in that damn thing." Keith Prince, the site manager for UESC personnel, characterized complainant's work as outstanding, and offered that complainant was responsible, more than any one else, for the success of the LLRT and ILRT programs. He also lauded complainant as the key person in the leak rate tests. Miller, the NRC inspector, considers complainant to be one of the best persons working on nuclear plant startups. These acclamations suggest that complainant was a valued employee whose termination would not have been in the best interest of the respondent TVA.

RESPONDENT'S REASON FOR TERMINATION

As the complainant has established a *prima facie*

case, TVA has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscrimatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y, April 25 1983).

Once a respondent satisfies its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. *Shusterman v. EBASCO Services, Inc.*, Case No. 87-ERA-417 (Sec'y, Jan. 6, 1992).

Respondent proffers that complainant was fired by Bajestani on July 5, 1994 because Bajestani received information that complainant was scheduled to be at work but was in Florida and

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would not be back for another week.[29] Bajestani testified that he terminated complainant because of a combination of lack of showing up for work, the test was completed, and unauthorized use of overtime.[30]

ABSENCE FROM WORK

Absence from work with or without leave was out of character for the complainant. During the twelve months complainant had worked at Watts Barr, he had taken off only twelve work days; five days for an operation and another seven days when he had to return to Maryland for divorce proceedings.[31] Commencing in April of 1995, complainant was working between 60 to 100 hours a week because of the added demands of the ice condenser system to his work on the LLRT and ILRT programs. Daly applauded complainant's work ethic: "He must have worked hundred of hours without ever a complaint. And many a time, I would just tell him, 'Bob, you've got to -- you're going to have to work the weekend again'. He never once ever buckled under working additional hours...He worked day in and day out and made the schedule on the testing, which was an extremely tight schedule.[32]

None of the witnesses who were questioned about complainant's work conduct believed that complainant was the type of employee who would, without leave, simply fail to report to work. Richard Camp, vice-President of UESC with the responsibility for implementing the contract with TVA, testified that he was surprised at the reason for complainant's termination. He was not aware of anything in complainant's work history to indicate that complainant would not show up for work. Steven Poulsen, a test group supervisor at Watts Bar, testified that complainant is a dependable, excellent worker who always got the job done.[33] Bryant opined that complainant is the type of person who you could count on to meet his work schedule. Prince testified that complainant presented no problem regarding absenteeism. Prince elaborated that when the complainant was absent for the operation on his leg and the divorce proceedings, he requested the time off.[34] Even Bajestani admitted that

prior to July 5, he did not consider complainant to be an absenteeism problem.[35]

It is illogical that an employee with complainant's reputation as a dependable and excellent worker, and a track record of taking minimal time off while working many hours of overtime without complaint, would be fired for being absent without leave, without being given the opportunity to explain his absence.

Also, the hostile reception accorded complainant by Bajestani when he returned with Pierce "to attempt to straighten matters out" reflects more than a concern over an employee's failure to inform his supervisor about taking time off. When

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Pierce told Bajestani that complainant was at the plant and wanted to talk to him about the matter, Bajestani not only refused to see complainant but became irate. Bajestani described his demeanor as excited. Pierce described the scene:

> A. ... And when Mr. Bajestani came in -- excuse me -- I asked him to please take a few minutes to talk to [complainant] and see if we couldn't get it rectified.
>
> Q. And what was Mr. Bajestani's reaction?
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> A. He went ballistic on me.
>
> Q. What do you mean, "he went ballistic"?
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> A. He started yelling, high voice, "Get him out of here. Get him out of here. I do not want to see him. I don't have anything to say to him. If you don't get him put of here, I'll have security escort him off site."
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> Q. Were you able -- From your observations at that point in time, what was Bajestani's attitude toward [complainant].
>
> A. I've never seen anyone have an attitude like that in my whole life. To my knowledge, he had done nothing -- [complainant] had done nothing. At the worst, it was take time off without asking. And I've never seen anybody react to that like Bajestani did.[36]

Bajestani testified that the reason he became excited at complainant's presence at the plant was because complainant's presence after his termination was a security violation. Bajestani's explanation is not accepted. Surely, an accommodation could have been made for an employee, who returns from a vacation to find his job terminated without warning, to appear at his job site to discuss the reasons for his termination and retrieve his personal belongings.

Bajestani's anger at complainant could not have resulted from complainant leaving behind unfinished work that only complainant was capable of completing. Bajestani testified that the ILRT was completed as of July 11 and other test engineers were present to write up the test results. Miller reported to

the DOL investigator that, in his opinion, there was no way that complainant could have been needed during the time that he was off, and "If I was his supervisor [I) would have told him to take off and have a good time."[37] Miller explained that the basis for

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his opinion was that the test results weren't available during the time complainant was off.[38]

Complainant testified that when he requested time off from Bryant on June 29, 1994, his request was for the periods June 30 and July 1, and July 5 through 9. Bryant contends that complainant only mentioned June 30 and July 1. Acceptance of this miscommunication or misunderstanding as the rationale for complainant's termination and the reason for the hostility of Bajestani toward complainant, in light of the aforesaid testimony of complainant's expertise and reputation as a worker, would be irrational. Accordingly, TVA's stated reason that complainant was terminated because he took leave without receiving prior approval is determined to be pretextural.

UNAUTHORIZED OVERTIME

Bajestani testified that a factor in his decision to terminate complainant's employment was complainant's use of unauthorized overtime.

Bryant was the test group supervisor. He testified that every week he would submit a request to Bajestani for overtime for the employees under his supervision. His request was based on his experience on the hours needed to do a particular job. Bajestani would approve the request or reply by setting a lower number of hours. All the employees, including complainant, at times worked more overtime hours than the number approved by Bajestani.[39] Bryant testified that there was no doubt that complainant worked those hours, and that complainant could explain the need for doing so. Bryant testified further that he warned complainant that the consequence of working the higher number of hours was that complainant would have to explain the need to Bajestani.[40] Complainant was always paid for the hours that he worked.

Bajestani started at Watts Bar in early May, 1994, about eight weeks before he fired complainant. Bajestani testified that during the eight weeks that both he and complainant worked at Watts Bar, complainant worked more overtime than he was authorized. However, Bajestani was unable to identify those weeks, and he admits that on the two occasions when complainant requested extra overtime from him, he granted the requests.[41] His predecessor as the Startup and Test Manager was Daly. Daly testified that he never had any problem with complainant working unnecessary overtime, but rather, "Usually the shoe was on the other foot."[42]

Prince's duties as the site manager for UESC at Watts Bar included bringing on new UESC employees, letting go employees dismissed by TVA, and working out any performance problems by UESC employees. He testified that no concern was ever expressed to him about complainant working unnecessary hours, and that if

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any such concern had been expressed to him, "we would have

cleared that up right away."[43]

Bajestani's testimony that complainant's working of unauthorized overtime was a reason for his termination is not creditable. Complainant was never informed by Bajestani, Bryant or any one else that the number of hours he was working was placing his job at risk. Bajestani never told complainant that there was a problem with him working more than the allotted overtime hours, even though complainant on two occasions requested authorization of additional overtime hours.

COMPLETION OF THE WORK

Bajestani's testimony that one of the reasons for the termination of complainant's employment was the completion of the ILRT is contradicted by the abrupt action he took in terminating complainant's employment. Complainant's termination is inconsistent with Bajestani's testimony that contract employees are given a one or two week notice of termination as their work nears completion.[44]

Accordingly, it is determined that the complainant has met his burden of showing that TVA's proffered reasons for his firing are pretextural. He has shown by the clear preponderance of the evidence that those reasons, as enumerated by Bajestani, did not actually motivate his discharge. See *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994); and *Shusterman v. EBASCO Services, Inc.*, *supra*.

TVA's termination of complainant's employment was a deliberate retaliation for his contacts with the NRA.

DELIBERATE VIOLATION

TVA argues that complainant should be denied relief under this claim because he deliberately violated an NRC regulation. TVA does not contend that the violation was a reason for complainant's employment termination but rather cites subsection (g) of the ERA, 42 U.S.C. §5851, for the proposition that the employee protection provisions of the ERA shall not apply with respect to any employee who deliberately causes a violation of any requirement of the Act.

TVA contends that complainant initialed a statement verifying a final valve alignment even though he knew the valve alignment and the procedure to be incorrect. In support, TVA refers to TVA Exhibits 16 and 17 where complainant's initials "verify that a final valve alignment verification has been performed."

TVA's argument is rejected. TVA has not shown that complainant deliberately submitted inaccurate information. To the contrary, this case arises, at least in part, because TVA in the person of Ken Clark refused to accept complainant's warning that the very same valve was misaligned, thereby inducing

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complainant to bring the misaligned valve to the attention of Rocky Gilbert, the NRC inspector.

Complainant testified that his initials on the statement were intended to verify that the penetration, as written in the procedure, was correct, not that he physically inspected the alignment of all 700 valves. Complainant insists that he took the appropriate steps for a situation where the procedure was technically correct but the actual alignment was wrong. He initialed the procedure verification form, verifying that the

procedure was technically correct, and then contacted the test director and told him of the misalignment, contacted the test director a second time, and upon finding that the misalignment was not corrected, contacted the NRC.[45]

Clearly, this record does not support a finding that the complainant deliberately submitted information to TVA regarding the misaligned valve that he knew to be incomplete or inaccurate.

DAMAGES

42 U.S.C. §5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

> ... the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The Court in *Deford v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983), interpreted the above-quoted section as permitting an award of reinstatement to a former job; restoration of all back pay, benefits and entitlements; compensatory damages insofar as they are thought to be appropriate; and reasonable attorney fees and costs.

REINSTATEMENT

The Secretary has adopted for ERA cases the "long accepted rule of remedies that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." *Francis v. Bogan*, Case No.

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86-ERA-8 (Sec'y, April 1, 1988). Complainant requests that he be reinstated to his former job. However, as a contract employee with TVA, he was hired by UESC under a contract between UESC and TVA whereby UESC agreed to provide startup engineering services at Watts Bar. Thus, complainant is entitled to reinstatement for only so long as he would have remained employed with TVA absent the discriminatory firing.

A finding of intentional discrimination shifts the burden of proof to the defendant in the damage phase of this type of case. *Woolridge v. Marlene Industries Corp.*, 875 F.2d 540, 546 (6th Cir. 1989). Once intentional discrimination in a particular employment decision is shown, the Courts have held that the disadvantaged applicant should be awarded the position retroactively unless the defendant shows by clear and convincing evidence that even in the absence of discrimination the rejected applicant would not have been selected for the open position.

League of United Latin American Citizens v. Salinas Fire Department, 654 F.2d 557 (9th Cir. 1981). Victims of discrimination are entitled to a presumption in favor of relief; because "recreating the past will necessarily involve a degree of approximation and imprecision." *Woolridge, supra.*, at 546.

At the time complainant was hired in September of 1992, he considered the plant to be about three years away from completion of the start up phase. He envisioned about ten years of work available at Watts Bar, considering start up and operation, but he realistically anticipated only three to five years of employment.[46]

When complainant left on June 29, 1994 on leave, he understood that upon his return he would resume his duties with the ILRT where there was "a lot of testing to be done," including the plant monitoring instrumentation which would take about another two months of work, and he would continue with his duties as the systems engineer for the ice condenser system, which had "an extensive amount of work and testing to be done." Complainant was also under the impression from a discussion he had with Bajestani that upon completion of his work with the ILRT, he would be assigned to work with the Heating, Ventilation and Airconditioning ("HVAC") section of the start up phase, which at that time was working seven days a week, twelve hours a day. Complainant testified that he was told by Bajestani that the remaining work he had with the air condenser system would not preclude his assignment to the HVAC section.[47] TVA had personnel from Startup doing HVAC work at the time of the hearing.[48]

Steven Poulson, a group supervisor in Startup and Test, testified that he was present for discussions among Bajestani, Bryant and others to the effect that complainant and his group would be moved back to HVAC after the ILRT was completed. The

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move was to be made because of vacancies in HVAC and availability of people after completion of the ILRT.[49] Prince testified that he was informed by complainant and an unidentified co-worker that Bajestani disclosed to them that he intended to switch the LLRT personnel over to HVAC work.[50]

Bajestani denied making a commitment to complainant that he would be assigned to the HVAC section upon completion of the ILRT work. Bajestani agreed that the HVAC section needed additional help but he testified that he would not have assigned complainant there because when he asked the supervisor of that section, John Ferguson, if he needed complainant, Ferguson told him that "he doesn't need complainant because he's not a good worker, something to that fact (sic)."[51] Ferguson testified that he never told Bajestani that complainant was not a good worker. Rather, he testified that he told Bajestani that he did not want complainant to work for him in the HVAC section because complainant was "arrogant and headstrong." Ferguson had become section supervisor on June 16, 1994, only about two weeks before complainant went on leave. He had minimal dealings with complainant; he knew him only by reputation from general office conversation.

James Bible is an electrical and instrumentation test group

supervisor with the Start up and Test organization. Complainant testified that Bible was present at the meeting between Bajestani and himself in June of 1994 where HVAC testing was discussed. Bible's recollection of the meeting was that Bajestani informed complainant that the next major test would be the HVAC. He does not recall Bajestani stating that he would move complainant and his group to the HVAC.[52]

Complainant was hired under a contract to provide engineering services during the startup phase. It is determined that TVA has not shown that the complainant's employment at Watts Bar would have terminated prior to the completion of the startup phase. Bajestani's testimony that he would not have retained complainant to work on the HVAC system is not credited. His testimony regarding the reason for complainant's termination on July 5 was found to be pretextural. For that reason, his testimony that complainant would have been terminated rather than assigned HVAC work is considered suspect. Moreover, his testimony is inconsistent with the statement he provided to the Wage and Hour Investigator on January 11, 1995. Bajestani told the Wage and Hour Investigator who investigated complainant's complaint that "if the incident hadn't happened", complainant would have continued at Watts Bar through November, 1994 working on the HVAC system.[53]

Ferguson's discussion with Bajestani wherein he described complainant as headstrong and arrogant was subsequent to

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complainant's activities as a whistle blower. Ferguson's characterization was based not on personal experience but rather on conversations with others. Those opinions could very well have reflected a disapproval of complainant's approaching the NRC inspectors. Ferguson himself expressed the concern that a safety matter should be first discussed with the two immediate levels of supervision before being reported to the NRC.[54] TVA has not shown that the testimony of Bajostani and Ferguson, to the effect that complainant would not have been retained through the startup phase to do HVAC work, was not affected by complainant's reputation as a whistleblower.

Accordingly, it is ordered that the complainant shall be reinstated so long as TVA continues to employ contract workers performing startup engineering services at Watts Bar.

BACK PAY

Complainant calculates a loss of pay and benefits resulting from the discriminatory firing from July 11, 1994 through April, 1995 to be $106,192.00. TVA does not contest these calculations. From July 11, 1994 through the date of hearing the complainant earned $6,801.59. Those earnings are subtracted from the complainant's loss of wages. Complainant is entitled to a loss of pay and benefits up to the time of hearing in the amount of $99,390.41 ($106,192.00 - $6,801.59 = $99,390.41).

Complainant is also entitled to back pay and benefits until reinstatement or until TVA's use of contract workers in the start up phase is completed. Both parties shall within thirty days supplement the record with evidence of additional loss of back pay and benefits from the date of hearing until the present.

PER DIEM

Complainant requests that he be reimbursed for the per diem

he would have received had he continued to work at Watts Bar. Complainant received per them of $45.00 a day because of his status as a contract employee. Complainant's request for per them is denied. The purpose of the per them was to defray the expenses of living in Tennessee while working at Watts Bar. Without the job, complainant does not have the extra expense of keeping up a temporary residence away from his permanent home.

INTEREST

Complainant is entitled to prejudgment interest on back pay and benefits, calculated in accordance with 29 C.F.R. 520.58(a) at the rate specified in the Internal Revenue Code, 26 U.S.C. §6621.

COMPENSATORY DAMAGES

Complainant testified that the lose of his job with TVA on July 5, 1994 and the resulting loss of income resulted in his inability to make the mortgage payments on his house in Walford, Maryland, the finance payments on his 1992 Mazda automobile and a

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boat. His failure to keep up the payments on his house resulted in its sale by foreclosure and his inability to make the payments on the car and boat resulted in their repossession.

The foreclosure and repossession resulted from complainant's loss of income after he was fired by Bajastani. Thus, the loss of the house, car and boat constitutes damages that complainant should be compensated for in order that he be made whole. Complainant's Exhibit 4 shows that the amount of money distributed to the mortgage holder after the foreclosure sale, $131,212.04, was $40,158.25 less than the amount complainant and his wife owed the mortgage holder, $171,370.29. Thus, complainant suffered compensable damages in the amount of the $40,156.25 deficiency judgment obtained against complainant and his wife as a direct result of complainant's loss of job.

Complainant, however, has failed to sufficiently document other losses. Complainant testified that the fair market value of the house is $20,000.00 more than the amount he owed on his mortgage. However, the only evidence complainant offered on the fair market value of his house was his own testimony. Complainant testified that he was knowledgeable about the fair market value because he had an appraisal performed about one year earlier when he refinanced his home. Complainant's testimony on fair market value was allowed over the objection of TVA on the condition that a copy of the appraisal be submitted post-hearing. No appraisal of the value of the home was submitted.

Complainant's Exhibit 5 shows that complainant was in default in the amount of $10,277.91 to Mazda American Credit on October 11, 1994. Complainant testified that he was in default that amount when the car was repossessed. Although complainant estimated the purchase price of his car to be about $26,000.00, he offered no evidence of the value of the Mazda when it was repossessed. Without such evidence, complainant's loss cannot be calculated.

Claimant argues that he lost $30,000.00 in equity when his boat was repossessed, that he incurred $3,500.00 in legal fees when he was unable to keep up his child support payments. He also argues that because of the loss of income after his firing

he incurred increased costs of living of $2,800.00, increased transportation expenses to work of ,228.50, travel expenses and time off from work to pursue this claim in the amount of ,750.00, and costs from physical injuries and emotional problems. However, these damages are not documented or otherwise adequately supported by the evidence. Complainant not only has the burden of showing that damages exist with reasonable certainty but also of documenting the amount of such damages. *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994).

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Accordingly, a second hearing devoted solely to damages will be convened to allow complainant an opportunity to meet his burden of proving those compensatory damages he sustained, other than back pay and interest thereon which he has already proven. *Nolan v. AC Express,* Case No. 92-STA-37 (Sec'y, Jan. 17, 1995).

ORDER

IT IS HEREBY ORDERED that a hearing will be conducted in this matter solely on compensatory damages sustained by complainant on Tuesday, October 31, 1995 at 9:00 a.m. at the following location:

U.S. BANKRUPTCY COURT
PLAZA TOWER
SUITE 1501
800 SOUTH GAY STREET
KNOXVILLE, TENNESSEE 37929

The parties shall exchange, by mail, copies of all documents that the party expects to offer into evidence at the hearing on compensatory damages on or before October 26, 1995.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

1. Respondent United Energy services Corporation's Motion for Summary Judgment be granted;
2. The complaint against Respondent United Energy Services Corporation be dismissed;
3. Respondent Tennessee Valley Authority be ordered to:

A. Reinstate complainant, Robert 0. Klock, either as a contract employee or its own employee for, at a minimum, so long as Respondent Tennessee Valley Authority continues to employ contract workers performing startup work at Watts Bar;

B. Pay to complainant back pay in the amount of $99,390.41;

C. Pay to the complainant interest on the back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. §6621; and

D. Pay to complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. A service sheet showing that service has been made upon the respondents and complainant must accompany the

application. Parties have ten days following receipt of such application within which to file any objections.

THOMAS M. BURKE
Administrative Law Judge

NOTICE: This Recommended Decision and order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1] The complainant's request for a continuance and subsequent request for an opportunity to submit a post-hearing brief were considered as constituting a waiver of the speedy decision provisions of 29 C.F.R. §24.3-24.6.

[2] Complainant's Exhibit 2, Attachment A.

[3] Complainant's Exhibit 8; Deposition of Richard Daly, Jr. March 24, 1995, p. 9.

[4] Complainant's Exhibit 6; Deposition of Kenneth E. Miller, March 23, 1995, pp. 38-39.

[5] The ice condenser system is a safety system whereby steam from a line break contacts ice which floods and cools the containment to prevent containment pressure from exceeding design pressure. N.T. pp. 55-56.

[6] N.T. p. 89.

[7] Complainant's Exhibit 8; Deposition of Richard Daly, Jr. *supra,* pp. 9-11.

[8] Complainants Exhibit 9; Deposition of Keith Prince, March 24, 1995, p. 9. Keith Pierce was involved in the LLRT and ILRT programs in an administrative capacity. He attended all the meetings, kept all the records, and made sure all the paperwork was filled out and turned in properly.

[9] N.T. p. 59.

[10] N.T. pp. 17, 59, 60.

[11] N.T. p. 61.

[12] N.T. pp. 64-66.

[13] N.T. p. 75.

[14] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 29.

[15] N.T. pp. 85-87.

[16] N.T. p. 391.

[17] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 30.

[18] N.T. p. 12.

[19] N.T. p. 102.

[20] Complainant's Exhibit 9; Deposition of Keith Prince, *supra*, pp. 14-15.

[21] N.T. p. 18.

[22] N.T. p. 22.

[23] N.T. pp. 7-9.

[24] *Id.*

[25] N.T. p. 57.

[26] N.T. p. 638.

[27] N.T. pp. 689-690.

[28] N.T. p. 391.

[29] See Repondent TVA's Posthearing brief, p. 19.

[30] N.T. p. 652.

[31] N.T. p. 121.

[32] Complainant's Exhibit 8; p. 10.

[33] N.T. p. 250.

[34] Complainant's Exhibit 9; Deposition of Keith Prince, *supra*, P. 10.

[35] N.T. p. 649.

[36] Complainant's Exhibit 9; Deposition of Keith Pierce, *supra.*, pp. 17-18.

[37] Complainant's Exhibit 6; Deposition of Kenneth Miller, *supra*, p. 45.

[38] *Id.*

[39] See Attachment A to Complainant's post-hearing brief showing the identity of twenty-five workers who worked additional hours than those approved by Bajestani.

[40] N.T. p. 47.

[41] N.T. pp. 657-658.

[42] Complainant's Exhibit 8; Deposition of Richard Daly, Jr., *supra*, p. 10.

[43] Prince testified that it was necessary for the complainant

to work the overtime in order to complete his assignments:

Q. Could you explain to the Administrative Law Judge why it was necessary, if it was, for [complainant) to work long hours during the pre-test Watts Bar situation.

A. The schedule was so tight in conjunction with the number of problems that they found. In almost every piece of equipment that was tested we would find problems because you understand, our equipment is many, many years old. It's not like the new equipment right now. And in order to meet the schedule and stay on target, he had to work that many hours. Complainant's Exhibit 9, Deposition of Keith Prince, March 24, 1995, p. 9.

[44] N.T. p. 651.

[45] N.T. pp. 712-714.

[46] N.T. pp. 52-53.

[47] N.T. p. 99.

[48] N.T. p. 279.

[49] N.T. pp. 251-252.

[50] Complainant's Exhibit 9; Deposition of Keith Prince, supra, pp. 19, 27.

[51] N.T. p. 635.

[52] N.T. pp. 313, 324.

[53] N.T. pp. 679-682.

[54] N.T. p. 277.